> Every agreement of which the object or consideration is unlawful is void.

I shall now consider the point raised by Miss L S Ng, that is, the question of illegality was not pleaded in the statement of defence. In *Wai Hin Tin Mining Co. Ltd v. Lee Chow Beng* [1968] 2 MLJ 251. Chang Min Tat J. decided that the Court could take notice of the illegality although it was not pleaded by the defendant. In his judgment at page 253, the learned Judge said:

> On the question whether in the absence of any specific defence on the ground of illegality ... I could take cognisance of such illegality, ... I thought the law ... was clear that in some cases the Court would itself take notice of the illegality of the contract in which the plaintiff was suing if it appeared on the force of the contract and from the evidence before it by either party, although the defendant had not pleaded the illegality ...

In *Natha Singh v. Syed Abdul Rahman & Anor* [1962] 28 MLJ 265. Hepworth J. said at page 266 as follows:

> It is clear from these cases that unless a defendant raises the defence of the illegality of the contract on the pleadings then he cannot rely upon it, **except where the contract is on the face of it illegal or its illegality is brought to the notice of the Court,** even the Court has no right to intervene.
> [Emphasis added]

I respectfully agree with the passages quoted above. In the present case the question of illegality was raised by Miss Jeniffer Teh and it was argued by both Counsel. Although this is an appeal from the decision of the Senior Assistant Registrar, the appeal was heard by way of re hearing. Since the question of illegality was brought to my attention, I considered myself bound to consider it although the question was not pleaded in the statement of defence.

For the reasons stated above I am of the view that this was not a proper case for summary judgment. I accordingly allowed the appeal with costs.

ONG SENG KEE

v.

LEE SOON FATT

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CIVIL APPEAL NO. 12-8-93 (T)]
9 OCTOBER 1993

PRACTICE & PROCEDURE: Stay of execution - Application by tenant/defendant dismissed by Sessions Court - Claim by plaintiff for vacant possession, rentals and mesne profits allowed by Sessions Court - Notice of Motion filed at High Court for stay of execution pending appeal - Defendant to show "special circumstances" to justify stay.

This was an application by the applicant/defendant for stay of execution pending an appeal against the decision of the Sessions Court, Taiping. The order of the Sessions Court was for the applicant/defendant to give up vacant possession in respect of Stall No. 1761, Jalan Kamunting, Taiping together with ground rentals at RM180, *mesne* profits and costs.

Held:

[1] Once the wooden zinc stall is removed, development would start and this would in turn cause serious or irreparable injury to the appellant/defendant if the stay is not granted.

[2] As there were materials in the affidavit of the appellant/defendant for granting stay of execution, order in terms of the application was granted.

[Stay of execution granted. Costs to be costs in the cause].

Cases referred to:

Atkins v. Great Western Railway Co. 11 TLR 400 ***(refd)***
Re Kong Thai Sawmill (Miri) Sdn. Bhd.; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors. (No. 2) [1976] 1 MLJ 131 FC ***(refd)***
Serangoon Garden Estate Ltd. v. Ang Keng [1953] 19 MLJ 116 ***(refd)***
Leong Poh Shee v. Ng Kat Chong [1966] 1 MLJ 86 ***(refd)***
Tilling & Anor. v. Whiteman [1978] 3 All ER 1103 CA ***(refd)***
Ajaib Singh v. Jeffrey Fernandez [1971] 1 MLJ 139 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 15 r. 6(1)

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 17, paragraph 455
The Britannica World Language Edition of **The Oxford Dictionary**

For the appellant - Gurubachan Singh; M/s Bachan & Kartar
For the respondent - R. Ravindran; M/s Xavier, Ravi & Sarjit Sidhu

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:
This is a motion by the appellant/defendant for a stay of execution of the order made by the Judge, Sessions Court. Taiping, Perak given on 26 April 1993 wherein vacant possession was ordered against the appellant/defendant in respect of stall number 1761, Jalan Kamunting, Taiping, Perak together with ground rentals at RM180 (calculated at RM20 per month from 1 January 1991 till 30 September 1991) and *mesne* profits at RM40 per month from October 1991 till vacant possession was delivered plus the costs of the action assessed at RM323 and it was further ordered that the counter-claim of the appellant /defendant be dismissed.

Incidentally, the appeal record shows that an application for a stay of execution was made by the appellant/defendant before the Judge, Sessions Court, Taiping, Perak on 15 September 1993, but the application was refused and there was no order as to costs.

The grounds of this motion as stated in enclosures 9B and 9C are: The appellant/defendant being dissatisfied with the order of Judge, Sessions Court, Taiping, Perak given on 26 April 1993 intends to appeal against that order (which he has now done vide Taiping High Court. Civil Appeal No. 12-8-93 (T)) (it must be borne in mind that a reasonable chance of success in the appeal is no ground for granting a stay - see *Atkins v. Great Western Railway Co.* II TLR 400 quoted with approval by the Federal Court in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.*; *Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors.* (No. 2) [1976] 1 MLJ 131 FC) and unless restrained, the appeal scheduled for hearing before the High Court, Taiping, Perak on 14 January 1994, would be an exercise in extreme futility. Put in another way, it was averred in the affidavit of the appellant/defendant that if the appellant/defendant succeeds in his appeal he would not be restored to the same position as before because the respondent/plaintiff would have removed his wooden zinc stall. It was also averred by the appellant/defendant that there are merits in the appeal and, consequently, there are special circumstances to justify a stay (see *Serangoon Garden Estate Ltd. v. Ang Keng* [1953] 19 MLJ 116 where it was laid down that the Court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it).

It is clear from a long line of authorities that the Court has an unqualified discretion to grant or refuse the stay. In **Halsbury's Laws of England,** 4th Edn., Vol. 17, paragraph 455, there is a passage which merits reproduction. It is this:

> The Court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.

It has been said that: "Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common" (see the speech of Raja Azlan Shah J. (as His Majesty then was) in *Leong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86). The Britannica World Language Edition of **The Oxford Dictionary** defines "special" to be "exceptional in character, quality or degree".

It is therefore incumbent on the appellant/defendant to show from the affidavit the special circumstances to enable this Court to grant a stay of execution. The question to ask is this: Whether the question of law that all joint owners and not one must sue for possession would sufficiently come under the category of special circumstances for a stay. It appears that from the extract of title (exhibit marked 'B' in enclosure 9C). the respondent/plaintiff was one of the four co-proprietors of the land in question and on the authority of *Tilling & Anor v. Whiteman* [1978] 3 All ER 1103 CA, it was argued and reliance was placed on the speech of Stephenson LJ in *Tilling's* case to the effect that: "One joint owner can sue for rent or give

notice to quit, **but all joint owners must sue for possession and judgment for possession cannot be given in favour of one only.**" On the other end of the scale, O. 15 r. 6(1) of the Rules of the High Court 1980 prevents an action from being defeated by the misjoinder or non-joinder of plaintiffs or defendants and allows, subject to certain principles, for the addition, substitution or striking out of persons as plaintiffs, similarly of defendants, intervention of persons not parties to the action and for misnomer, so submitted learned Counsel for the respondent/plaintiff. Such an argument would show that questions of law do exist and that seems to be the stand adopted by the respondent/plaintiff in his affidavit-in-reply (enclosure 11A) at paragraph 11 where he says:

> Saya juga ingin merujuk kepada Perenggan 8 dan 9 afidavit defendan, dan ingin menegaskan di sini, isu-isu tersebut adalah isu-isu undang-undang yang patut diselesaikan semasa pendengaran rayuan sibil tersebut.

There is another matter that merits consideration. It is this. Before the Judge, Sessions Court, Taiping, Perak delivered her judgment on 26 April 1993, the respondent/plaintiff at his own peril and risk, jointly entered with the co-proprietors of the land into an agreement with Koi Kim Seng Development Sdn. Bhd. on 15 September 1992, to develop the land. The land has since been developed almost to its completion but for the presence of the wooden zinc stall belonging to the appellant/defendant (a real eyesore, see the photographs at exhibit "LS4" in enclosure 11A). Once the wooden zinc stall is removed, development would start and this would in turn cause serious or irreparable injury to the appellant/defendant if the stay is not granted (see *Ajaib Singh v. Jeffrey Fernandez* [1971] 1 MLJ 139). I would therefore agree with Mr Gurbachan Singh that there are materials in the appellant/defendant's affidavit for granting stay of execution and I so order. Costs to be costs in the cause.

Stay of execution granted.

PATRICK DAYEY

v.

PUBLIC PROSECUTOR

HIGH COURT, SIBU
TUAN STEVE L.K. SHIM J.
[CRIMINAL APPEAL NO 2 OF 1994]
23 MAY 1994

CRIMINAL LAW: Charge of criminal breach of trust - Whether prosecution had proved its case beyond reasonable doubt - Whether there was dishonest misappropriation of property.

The accused was charged with criminal breach of trust in respect of one television set. The prosecution's case was that the accused had entered into a hire-purchase agreement for the purchase of a National 20" coloured TV set on 27 September 1983. Upon the accused's default in the monthly repayments, the hire-purchase company sought to repossess the TV set but was informed by the accused that the TV set was not in the house. It was also the case for the prosecution that the accused had sought the assistance of two of his colleagues (PW7 and PW8) in selling the TV set and that the TV set was in fact sold to a businessman on 26 September 1983.

On the accused's conviction by the lower Court, the question that arose on appeal was firstly whether the prosecution had established conclusively that the TV set bought by the accused was the same TV set allegedly sold by him and secondly whether there was in fact dishonest misappropriation of property by the accused.

Held:

[1] Reading the judgment of the learned Magistrate as a whole, it seems clear that she was very much influenced by the evidence of PW7 and PW8 who had testified that they had sold the TV set at the request and on behalf of the appellant. In holding that there was a *prima facie* case, the learned Magistrate had failed to realise that the TV set sold by PW7 and PW8 could not possibly be the same TV set which the appellant had bought through the hire purchase agreement given the fact that it was in evidence that PW7 and PW8 had sold the TV set on 26 September 1983 whereas the hire purchase agreement was entered into on 27 September 1983.

[2] There was no evidence that the appellant had disposed of the TV set in any way, wherein